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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

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No. 268

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MISSOURI-KANSAS PIPE LINE COMPANY

*Appellant,*

*v.*

THE UNITED STATES OF AMERICA,
COLUMBIA GAS & ELECTRIC CORPORATION,
COLUMBIA OIL & GASOLINE CORPORATION,
ET AL.

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No. 269

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PANHANDLE EASTERN PIPE LINE COMPANY,

*Appellant,*

*v.*

THE UNITED STATES OF AMERICA,
COLUMBIA GAS & ELECTRIC CORPORATION,
COLUMBIA OIL & GASOLINE CORPORATION,
ET AL.

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**Appeals from the District Court of the United States for the District of Delaware**

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# BRIEF FOR THE CITY OF DETROIT, AS *AMICUS CURIAE*

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**Appeals from the District Court of the United States for the District of Delaware**

## BRIEF FOR THE CITY OF DETROIT, AS *AMICUS CURIAE*

The City of Detroit respectfully asks that this Brief, filed as *Amicus Curiae*, pursuant to Supreme Court Rule 27 (9), be considered by the Court on this appeal.

## STATEMENT OF THE CASE

The City of Detroit concurs in the "Statement of the Case" set forth in Appellants' Brief. In addition to the facts therein stated, it should be noted that after the United States had found the Consent Decree of January 29, 1936 to be ineffective (R. 280) and after the Attorney General had moved for additional and more effective relief (R. 334) the corporate defendants, Columbia Gas & Electric Corporation and its subsidiary, Columbia Oil & Gasoline Corporation, proposed a "Plan" for the stated purpose of eliminating any illegal control by them over Panhandle Eastern (R. 356, 397).

Briefly stated, the Plan was to separate Columbia Oil from its parent, Columbia Gas, but to permit Columbia Oil to retain control of Panhandle Eastern Pipe Line Company subject to one proviso, namely, that for the next five years the Panhandle Eastern directors who were elected by Columbia Oil should not be "objectionable to the Department of Justice" (R. 360). As the Plan perpetuates in Columbia Oil control over Panhandle Eastern it becomes important to know who controls Columbia Oil.

It is alleged by Missouri-Kansas Pipe Line Company, and not denied, that at the 1939 Columbia Oil annual meeting the Columbia Oil management cast 99.9% by management proxies of all votes and that 82.9% of that vote represented stock owned by persons who are also stockholders of Columbia Gas (R. 534). Columbia Oil was initially organized by Columbia Gas for the purpose of holding certain of the properties and securities of Columbia Gas. The original Board of Directors of

Columbia Oil were selected by Columbia Gas and its officers and directors. The management thus put in charge of Columbia Oil by Columbia Gas at its inception has perpetuated itself in control of Columbia Oil at all times since its organization through the solicitation of management proxies and the use of said proxies to continue the same management in office (R. 418).

The Special Master who considered the Plan points out the substantial identity of stockholders of Columbia Gas and Columbia Oil, and, while approving the Plan, warns that because of such identity of ownership the Plan "cannot be regarded as certain to accomplish the purpose of the Consent Decree" (R. 377). The Special Master found that the Columbia Oil stock was originally distributed by Columbia Gas in 1930 to its common stockholders as a stock dividend and at the present time, 68% of Columbia Oil stockholders own common stock of Columbia Gas (R. 377). He found that no evidence was presented as to how many other Columbia Oil stockholders own other Columbia Gas securities, either preferred stocks or debentures (R. 377).

He does find, however, that the percentage necessary to constitute a quorum for meetings of stockholders of Columbia Oil is 33 1/3% or 778,942 shares, so that 389,472 shares would constitute a majority at a meeting with a quorum present. He found that persons closely identified with Columbia Gas have a total of something over 329,000 shares, excluding stock of Mr. Gossler (President of Columbia Gas) amounting to 75,872 shares, which under the Plan Gossler must sell. The Referee says:

> " * * * no attempt was made to show the holdings of persons, such as close relatives, not living in

the same house, friends or business associates, not included in this narrow classification but who might be expected to follow the wishes, advice or example of the persons whose stock holdings were disclosed. I do not imply that it would have been possible to submit data showing such holdings *but, the burden being on the proponents of the plan, I am not willing to assume that such persons, who might vote their stock in favor of Columbia Gas rather than Columbia Oil where there was a conflict of interest, do not hold a substantial amount.* (Italics added.)

"There is not included in the tabulation above the stock held in the 'Street' names of Coggeshall and Hicks, Gude, Winmill & Co., Jessup and Lamont, or W. E. Hutton, though the holdings of these brokers appeared in Columbia Oil Exhibit 2 and Missouri-Kansas argues that, on account of the close connection between these firms and Columbia Gas, it would be reasonable to assume that much of the stock in these names might be voted in the interests of Columbia Gas, which may be true. If such an assumption were accepted, 113,517 shares would be added to the holdings listed above making a total of 329,392 shares, excluding Mr. Gossler's" (R. 376, 377).

The City of Detroit opposed this Plan (R. 395) and filed exceptions to the Master's Report (R. 406).

## THE INTEREST OF THE CITY OF DETROIT

This Court will take judicial notice that the City of Detroit, according to the last census, is the fourth largest city in the United States. At the present time there are only two sources of natural gas supply that might be available to the City, namely, Appalachian gas, through the Columbia Gas & Electric system, and Texas gas, through the Panhandle Eastern Pipe Line Company (Map R. 540 D). Detroit is now served by Texas gas delivered through the Panhandle Eastern pipe line as far as Dana (near the Illinois-Indiana line) and from Dana to Detroit by a wholly owned subsidiary of Columbia Gas, namely, Michigan Gas Transmission Company. The contract under which gas is purchased by the Detroit City Gas Company provides in paragraph 8 of Article II that, if an adequate supply of natural gas to meet the requirements of Detroit City Gas Company is developed by responsible parties other than Panhandle Eastern and is made available to Detroit City Gas Company at a lower price than that charged by Panhandle Eastern, then the contract between the distributing company and Panhandle Eastern may be terminated if Panhandle Eastern does not meet the lower price within six months (R. 196).

The City is itself a large user of gas, and it is in the interest of the City as a whole that a large supply of natural gas be made available to its citizens for industrial, commercial and domestic use at the lowest possible price. It is obvious, of course, that so long as Columbia Gas controls both sources of supply, there will be no competition between them and this is obviously to the

disadvantage of consumers in the City of Detroit. Accordingly it is to the interest of Detroit that Panhandle Eastern should be placed in that position which the United States and the defendants originally stipulated it should be, namely:

> "* * * in a position of free and independent action in the production, transmission, sale and distribution of natural gas in competition with others" (R. 143).

The United States found that the decree was ineffectual to accomplish that declared purpose as is seen from the two petitions filed by the Attorney-General on January 12, 1939 (R. 274) and the "Amended and Supplemental Complaint" filed May 15, 1939 (R. 334) wherein it is stated that "not only has said Consent Decree failed to nullify those elements of control over Panhandle Eastern by Columbia Gas which existed at the time of the entry thereof, but Columbia Gas has actually strengthened its position of control since that date * * * " (R. 340).

On June 20, 1940 Columbia Gas and Columbia Oil filed the so-called Plan to which reference is made elsewhere in this brief (R. 356).

The City of Detroit sought to intervene in the proceedings wherein the Plan was considered, but its application was denied. It was permitted to appear as *amicus curiae*. The City of Detroit did so appear, and filed objections to the report of the Special Master (R. 406).

None of the provisions of the Plan itself are before this Court because the City of Detroit was not permitted

to intervene in the proceedings in which it was considered, and as *amicus curiae,* has no right of appeal from the order approving it. The same is true with respect to Mokan. *It sought to intervene twice* (R. 321, 371). There is therefore no way in which the Plan itself can be brought before this Court, even though it flouts every other anti-trust decision which this Court has ever made, as is shown by the brief of Mokan which was filed in the District Court in opposition to the Plan and which is annexed hereto as an appendix to this brief. The City of Detroit regards the Plan as inadequate and ineffective.

The City of Detroit also believes that the connecting link between the Panhandle Eastern Pipe Line and the City of Detroit is an integral part of the Panhandle Eastern Pipe Line and properly belongs to Panhandle Eastern (R. 148).

It is to the interest of the City of Detroit that a competitive source of supply of natural gas be available (Map R. 540D) not alone for domestic needs, but for its ordinary everyday industrial uses and that Panhandle Eastern be managed and controlled by those persons who are free to sell gas at competitive prices without regard to the maintenance of price structures in the adjoining territories served by the Columbia Gas system (Map R. 540C). The citizens of Detroit are entitled to the benefits that flow from competitive enterprise.

## ARGUMENT

**I. The Retention By Columbia Oil & Gasoline Corporation of Certain Securities Which Now Enable it to Control Panhandle Eastern Is Illegal.**

It is a premise of this brief that the individuals who control Columbia Gas also control Columbia Oil. Therefore, the City of Detroit is in complete disagreement with the statement with which the Department of Justice concludes its brief, that

> "The plan approved by the District Court and accepted by the Government is believed to be a practical solution to the difficulties arising from the complex relationships of the parties concerned.
>
> (c) Accordingly, if this Court should go beyond the narrow questions apparently considered by the court below upon these applications, we respectfully submit that they should be considered in the light of the supplementary proceedings and that no disposition of the applications should be made here that would be inconsistent therewith."

The questions now presented to this Court are not narrow. They go to the fundamental matter of control of Panhandle Eastern Pipe Line. In the opinion of the City of Detroit, the proper determination of that question is vital to the interests of the citizens of Detroit.

At present Panhandle Eastern is controlled by Columbia Oil through the ownership of the following Panhandle Eastern securities:

(a) 404,326 shares, or 50.08% of the total outstanding shares of common stock; and

(b) 10,000 shares of Class B Preferred which has the right to elect two directors.

If the above described securities or any part of them were illegally and improperly acquired by Columbia Oil, then Columbia Oil should be required to surrender them. In that event the deficiencies in the present Plan would be less material because Columbia Oil would not own control of Panhandle Eastern.

The petitions herein allege that 80,000 shares of common stock of Panhandle Eastern out of the above mentioned 404,326 were acquired by Columbia Oil in violation of the provisions of the Consent Decree. If this claim were to be sustained it would mean that Columbia Oil must surrender that 80,000 shares for some other type of non-voting security and in consequence the control which it now exercises over Panhandle Eastern by virtue of its majority ownership of the common stock would be removed.

The Petition alleges that the 10,000 shares of Class B Preferred Stock was also illegally acquired by Columbia Oil in violation of the express provisions of the consent decree. If this claim be sustained, then Columbia Oil would have to surrender that stock and in consequence any control now exercised by virtue of it would also be removed.

A decision on these matters as well as on the ownership of the Detroit extension (which is hereinafter dealt with) is of paramount importance to the City of Detroit, because the City believes that the Plan is wholly ineffectual to remove the restraint heretofore practiced on Panhandle Eastern. There is such an identity of stockholders of Columbia Gas and Columbia Oil that to continue the existence of Panhandle Eastern control by Columbia Oil confirms in those persons who control both Columbia Oil and Columbia Gas the perpetual right,

*under Government sanction*, to restrain Panhandle Eastern in violation of the anti-trust laws.

As one example of the weakness of the Plan, we desire to point out how the Columbia Oil stockholdings of Philip G. Gossler, and of his wife and daughter, are dealt with. Gossler was originally the President of both corporate defendants and is now Chairman of the Board of Columbia Gas (R. 111, 375); he is perhaps the principal individual defendant in this action. The Special Master found that Gossler owns large blocks of both Columbia Oil and Columbia Gas, and also found that Mrs. Gossler and Mrs. Clay, the daughter of Mr. Gossler, are owners of substantial amounts of Columbia Oil stock (R. 375). The proposed decree provides that Gossler shall sell his Columbia Oil stock within five years from the date of the amended decree, being meantime enjoined from voting any such shares; but as to Mrs. Gossler and Mrs. Clay, the decree merely provides that Mr. Gossler shall be enjoined from "*suggesting how any shares of such stock owned by any of his relatives should be voted*" (R. 357). *Who is to police Mr. Gossler's suggestions to his own wife and daughter?* It is submitted that this is not the sort of protection against monopoly to which the citizens of Detroit are entitled!

The Master also finds that there are substantial blocks of Columbia Oil held by persons ~~closely~~ affiliated with Columbia Gas, but no provision, either to sterilize or distribute them, is made. It therefore becomes increasingly important and far from a "*narrow question*" to determine whether or not the control of Panhandle Eastern Pipe Line was properly and legally acquired by Columbia Oil, and whether or not such control should be perpetuated. This can only be done through a hearing on the petitions which are now before this Court.

**II. The Connecting Link Between the City of Detroit and the Eastern Terminus of Panhandle Eastern Was Improperly Acquired by Columbia Gas & Electric Corporation and Should Be Returned to Panhandle Eastern Pipe Line Company.**

At the time the Consent Decree was entered there was no connecting link between Dana, where the Panhandle Eastern line then ended, and the City of Detroit (Map-R. 540C). However, prior to the entry of the Decree, the Detroit City Gas Company, which distributes the natural gas in the City of Detroit, had made a contract with Panhandle Eastern, dated August 31, 1935, for the purchase of "all of the natural gas requirements" of the Detroit City Gas Company for distribution and sale to any and all of its present and future customers and for its own use (R. 193). The contract further provided that its carrying out was dependent upon the construction of a connecting pipe line and reinforcement of the existing main line of Panhandle Eastern and Panhandle Eastern agreed to use its best efforts towards financing the construction of said connecting line (R. 195).

The Decree contemplated this construction and provided, referring to the Detroit contract, that if "financial assistance be secured from Columbia Gas * * * such financial assistance (may be) furnished only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas * * * any rights of ownership in the works or properties of Panhandle Eastern, except as security for the investment" (R. 148). The defendant Columbia Gas nevertheless proceeded to cause a series of contracts to be made between Panhandle Eastern and a wholly owned

subsidiary of Columbia Gas (Michigan Gas Transmission Corporation) by which the following occurred:

(1) Columbia Gas constructed for its own benefit a connecting line between Dana and the City of Detroit (called the Michigan Gas Transmission line) (R. 157).

(2) Michigan Gas Transmission Company transports *all* of the gas which is sold to Detroit City Gas Company (R. 162-164).

(3) Any other gas which Panhandle Eastern might have for sale at points east of Dana, i. e. in either the Indiana or Michigan markets, must be transported through Michigan Gas Transmission Co. (R. 165).

(4) Michigan Gas Transmission Company bills to and collects from the Detroit City Gas Company the total purchase price of all gas sold by Panhandle Eastern, and after deducting its own proportion, pay over the balance to Panhandle Eastern (R. 178).

To all practical intents and purposes, Columbia Gas, through ownership of said connecting link and by virtue of the March 17, 1936 contract, came in complete control of all gas which Panhandle Eastern had for sale at any point east of Dana, just as surely as if it owned the entire Panhandle Eastern system. Regardless of control of Panhandle Eastern, the ownership of the Detroit Extension gave control over the markets. The extent to which such control has been extended is vividly portrayed by the Maps re-produced at pages 540B-540D of the Record. From an examination of these Maps it will be seen that at the date the Decree was en-

tered, the defendants Columbia Gas had no markets, with minor exceptions in Indiana and none at all in Michigan. At the date when the petition herein was filed Columbia had extended its area to the extent shown by the Map re-produced on page 540D. The City of Detroit finds it impossible to understand how such expansion could be had in the face of a Decree providing that its purpose was to restore Panhandle Eastern to a position of free and independent action. Certainly, if the decree had freed Panhandle Eastern from restraint, one would not expect to find that it had never progressed a single inch from the point at which it was located when the Decree was entered. The end of the Panhandle Eastern line *was Dana, is Dana,* and the City of Detroit believes that it *will continue to be Dana* so long as the Columbia Gas System can exercise any control over its expansion. The record does show that Columbia Gas owns the extension but the record is barren of any of the details surrounding the transaction. The fact is that Columbia Gas was forbidden to acquire any works or properties of Panhandle Eastern. The fact remains that Columbia now owns the connecting line. The petitions herein allege that the acquisition was illegal. It is respectfully urged that this question, so important to the consumers of Detroit, should be determined on its merits, and not decided on any question of technical procedure.

### III. The Appellees' Briefs.

The questions raised by the Appellees relate wholly to procedural questions. At no point is an effort made to meet the issues on the merits. The City of Detroit respectfully urges that in the interests of justice to its citizens, there should be a determination on the merits

of Columbia's right to retain the securities and connecting pipe line which are alleged to have been improperly acquired, and through which it can perpetually control Panhandle Eastern, the natural gas supply to the City of Detroit.

Respectfully submitted,

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JAMES H. LEE,
Assistant Corporation Counsel,
*Attorneys for the City of Detroit.*

## APPENDIX A

IN THE

# District Court Of The United States

FOR THE DISTRICT OF DELAWARE

In Equity No. 1099

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, *et al.*,
*Defendants.*

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## BRIEF OF MISSOURI-KANSAS PIPE LINE COMPANY, AS *AMICUS CURIAE*

No precedent has been cited and none will be found to support such a Plan as is here proposed for the dissolution of an illegal combination in restraint of trade. No case will be found in which the corpus of illegally acquired stock has been permitted, as here, to remain intact in the possession of the very corporation which illegally acquired it.

If the Court approves the Plan here proposed it will not only be moving without supporting precedent, but will have to set its face against the accumulated body of law, and the decisions of the United States Supreme Court over the 50-year period in which the anti-trust laws have been in effect.

## Proceedings Heretofore Had

The United States instituted proceedings in March, 1935, against the defendants herein named, under the Sherman and Clayton Acts. The principal transaction complained of was the acquisition by the defendants (through the medium of Columbia Oil & Gasoline Corporation) of the controlling securities of Panhandle Eastern Pipe Line Company, and the use of that stock control to restrain trade and commerce.

A Consent Decree was entered in this Court against the defendants on January 29, 1936, by which, with their consent, the defendants were enjoined against further restraint of Panhandle Eastern. The Panhandle Eastern stock was placed in the custody of Gano Dunn, as Trustee. No restriction was imposed on the payment or receipt of dividends on the Panhandle Eastern stock, nor on voting, excepting only that the Trustee who was appointed to hold the stock was to elect himself as one of the Panhandle directors and to elect the remainder from among persons recommended by one of the defendants (Columbia Oil).

That Decree having failed to end the restraint, a Plan purporting to effect the dissolution of the unlawful combination was proposed in this Court and referred to a Special Master whose Report has been filed.

The Plan is said by the defendants to effect a complete separation between the defendants Columbia Oil and Columbia Gas. If consummated; Columbia Gas & Electric Corporation *as such* will divest itself of all voting stock in Columbia Oil, but will continue to own all of the Columbia Oil debt which may be a minimum of $11,000,000

or a maximum of $23,000,000. Columbia Gas stockholders own 68% of the common stock of Columbia Oil and consequently control it. While this 68% is spread among a total of about 17,000 stockholders, *the actual control* is in the hands of only 370 of those stockholders, who own 33.2% of Columbia Oil stock (Columbia Gas & Electric Corporation Exhibit 9). Under the Plan Columbia Oil will have no property or assets of any kind except its controlling securities of Panhandle Eastern.

Looking at it in another way, if the Plan be consummated Columbia Oil will really be nothing but another name for Panhandle Eastern, *because Columbia Oil's only asset will be control of Panhandle Eastern.* Under the Plan the same stockholders who own Columbia Gas will control Columbia Oil and therefore control Panhandle Eastern. Thus only the fiction of corporate entities will distinguish these Columbia Corporations from each other.

There is a further provision of the Plan that directors of Columbia Oil shall be elected who are not objectionable to the Department of Justice for a period of five years.

## POINT I.

**The Plan is violative of every existing authoritative precedent in similar cases and fails to create a condition honestly in harmony with the law.**

The following list contains all the so-called corporate combination cases brought by the Government under the anti-trust laws during the fifty years from the enactment of the Sherman Act in 1890 to the present time. Corporate combination cases are those in which the control of corporations or businesses has been effected by acquisition of stock, properties, or other securities.

The list shows a total of 29 such cases. In five the complaint was dismissed and in one the Government failed to make out a corporate combination case. In the 23 remaining cases, in which the Government has been successful, the decrees have required a divestiture of stocks, properties, bonds, liens, leases, etc., for the purpose of effecting a complete dissolution of the combinations into the several independent parts originally existing.

1. *U. S. v. E. C. Knight Co.*, 60 Fed. 306; 60 Fed. 934; 156 U. S. 1. Dismissed.
2. *U. S. v. Northern Securities Co.*, 120 Fed. 721; 193 U. S. 197. Contested decree, March 14, 1904.
3. *U. S. Standard Oil Co.*, 173 Fed. 177; 221 U. S. 1. Contested decree, July 29, 1911.
4. *U. S. v. American Tobacco Co.*, 164 Fed. 700; 221 U. S. 106. Contested decree; Nov. 16, 1911.
5. *U. S. v. Du Pont Co.*, 188 Fed. 127. Contested decree, June 13, 1912.
6. *U. S. v. Union Pacific R. R. Co.*, 188 F. 102; 226 U. S. 61; 226 U. S. 470. Contested decree, June 30, 1913.
7. *U. S. v. Great Lakes Towing Co.*, 208 Fed. 733; 217 Fed. 656. Relief refused—no corporate combination case made out.
8. *U. S. v. American Sugar Refining Co.*, Southern District, New York. Consent decree, May 9, 1922.
9. *U. S. v. Lake Shore Ry. Co.*, 203 Fed. 295. Contested decree, March 14, 1914.
10. *U. S. v. U. S. Steel Corporation*, 223 Fed. 55; 251 U. S. 417. Dismissed.
11. *U. S. v. United Shoe Machinery Co.*, 222 Fed. 349; 247 U. S. 32. Dismissed.

12. *U. S. v. International Harvester Co.,* 214 Fed. 987. Contested decree, Nov. 2, 1918.

13. *U. S. Corn Products Co.,* 234 Fed. 964. Contested decree, Nov. 13, 1916.

14. *U. S. v. Eastman Kodak Co.,* 226 Fed. 62. Contested decree, June 20, 1916.

15. *U. S. v. Quaker Oats Co.,* 232 Fed. 499. Dismissed.

16. *U. S. v. Reading Co.,* 226 Fed. 229; 253 U. S. 26. Contested decree, June 6, 1921.

17. *U. S. v. American Can Co.,* 230 Fed. 859; 234 Fed. 1019. Dismissed.

18. *U. S. v. Southern Pacific Co.,* 239 Fed. 998; 259 U. S. 214. Reorganization approved by Interstate Commerce Commission.

19. *U. S. v. Lehigh Valley R. R. Co.,* 225 Fed. 399; 254 U. S. 255. Contested decree, Nov. 7, 1923.

20. *U. S. v. New York, New Haven & Hartford R. R.,* Southern District, New York. Consent decree, Oct. 7, 1914.

21. *U. S. v. New England Fish Exchange,* District of Mass., 258 Fed. 932. Contested decree, Dec. 4, 1919.

22. *U. S. v. Swift & Co.,* Supreme Court, District of Columbia. Consent decree, Feb. 27, 1920.

23. *U. S. v. Cement Securities Co.,* District of Colorado. Consent decree, Dec. 13, 1924.

24. *U. S. v. Ward Food Products Co.,* District of Maryland. Consent decree, April 3, 1926.

25. *U. S. v. National Food Products Corporation,* Southern District, New York. Consent decree, March 4, 1926.

26. *U. S. v. Rand Kardex Bureau,* Southern District, New York. Consent decree, Dec. 9, 1926.

27. *U. S. v. Fox Theatres Corporation,* Southern District, New York. Consent decree, April 15, 1931.

28. *U. S. v. Foster & Kleiser Co.,* Southern District, California. Consent decree, March 13, 1931.

29. *U. S. v. Radio Corporation of America,* District of Delaware. Consent decree, Nov. 21, 1932.

### The Northern Securities Case.

The plan is inconsistent with *United States v. Northern Securities Co.,* 120 Fed. 721, 193 U. S. 197 (the second corporate combination case under the antitrust laws, and the first of such cases in which the Government prevailed). In that case the Northern Securities Company had acquired 96 per cent of the stock of the Northern Pacific Company and 76 per cent of the Great Northern Company, two great competitive railroads, serving the public in the territory from Duluth, St. Paul and Minneapolis across the continent to Puget Sound. The par value of the acquired stocks was about $250,000,000, which is much greater than the market value at this time of the Panhandle stock. It will be observed that the Northern Securities Company was a holding company and not an operating company. And it will be remembered that the Plan proposes to change Columbia Oil from an operating to a holding company, having as its only asset the Panhandle Eastern securities.

In the *Northern Securities* case a decree was entered against the defendants prohibiting the voting of the Great Northern and Northern Pacific stock, the payment and receipt of dividends thereon, the election of directors by vote of the acquired stock, and the exercise of any direction or influence over the management of the two railroad companies.

These provisions were effective in the *Northern Securities* case to force a divestiture and restoration of the two railroad companies to a status of independence, because, as stated by the Supreme Court in *Harriman v. Northern Securities Co.,* 197 U. S. 244, the prohibitions of the decree rendered the continued ownership of the shares "useless" to the Securities Company. This was in purpose and effect an order of complete divestiture.

The only concession granted by the court was the permission for distribution of the illegally acquired (*i. e.,* the Northern Pacific and Great Northern Railway Co.) stock among the stockholders of the Securities Company, stated in the decree as follows:

> " * * * nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; * * * ". (120 Fed. 721, 732).

The Plan in the present case is defended on the ground that the community of interest (*i. e.,* the identity of stockholders in Columbia Oil and Columbia Gas) which will exist when the changes proposed by the Plan shall have been made is in accordance with the Northern Securities and other cases. In the *Northern Securities* case, the decree sterilized and rendered useless the illegally acquired securities through enjoining receipt of dividends, voting, etc. of the stock and then merely permitted ratable distribution, but under this Plan there is neither injunction nor distribution. Even ratable distribution has

not been permitted in every case, as we will show, but in that case was justified for special reasons. First, because it prevented the existence of another unlawful restraint. This is shown by the case of *Harriman v. Northern Securities Co.*, 197 U. S. 244, which was a sequel to the Government case. Harriman and the Union Pacific Company had together transferred shares of the Northern Pacific which carried control of that company; and they insisted that instead of a participation in the ratable distribution of the stock of both railroad companies they should have back all the Northern Pacific stock which they had originally contributed. The Court refused, because (1) it would be inequitable to the other Securities Co. stockholders and (2) that it would have established an unlawful control of the Northern Pacific and the Union Pacific. It said:

> "And it is clear enough that the delivery to complaints of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.
>
> The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition" (197 U. S. 297).

It is evident, therefore, that ratable distribution was permitted because of the special situation with regard to the Harriman and Union Pacific stock.

Secondly, another special situation which supported ratable distribution in the *Northern Securities* case was that

the forced sale of several hundred millions of stock would have produced seriously harmful results. In the *Harriman* case the Court said:

> "Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results" (197 U. S. 299).

No special situation in this case has been shown to this court to even support an approval of a ratable distribution of the Panhandle Eastern stock. No assertion, and no factual showing, has been made, *or could be made,* to this court by the defendants that the slightest loss or hardship will result from complete and absolute divestiture of the Panhandle stock by outright sale. Passing to the court of total responsibility for approval of the Plan strongly argues that no such showing has been made to the Attorney General.

But these defendants under the Plan are not even proposing a ratable distribution of the Panhandle stock. No action whatever to accomplish a diffusion of the Panhandle stock into a general community of ultimate stockholders is provided for under the Plan. Instead, the Plan proposes that the unlawfully acquired Panhandle stock shall be permanently consolidated in the agency used by the defendants for its original unlawful acquisition, namely, Columbia Oil & Gasoline Corporation. Columbia Oil was in the beginning, has since continued, and now is, merely the common corporate trustee designated to act for the defendants in holding the Panhandle stock. It was used as a mere custodian of that stock. To leave

that stock so consolidated will be to countenance unlawful acts and permit an unlawful condition to continue, *because it is the consolidation of that stock for the benefit of the* SAME BODY OF STOCKHOLDERS *which caused and which will continue the restraint.* The Supreme Court pointed this out in condemning a similar device in the *Northern Securities* case. 193 U. S. 197, in the following words:

> "What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act?" (p. 335).
>
> "* * * the defendant Morgan. In his testimony he was asked, 'Why put the stocks of both these (constituent companies) into one holding comany?' He frankly answered: 'In the first place, this holding company was simply a question of custodian, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company, in whose hands, not as a real purchaser or absolute owner, but simply as a custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies * * * " (p. 354).

The Plan proposes to convert Columbia Oil into a holding company to act simply as a custodian and simply

and solely to hold control of Panhandle Eastern in the manner and for the purpose thus condemned by the Supreme Court.

The great vice of the Plan is that it does not touch the cause of the restraint of trade. It permits the continuance of a control of Panhandle which inevitably produces the unlawful condtion which the anti-trust laws aimed to prevent. Such a control and such results were referred to by a three-judge special court in the *Northern Securities* case as follows:

> "It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, *to a few men acting in concert and in its name and under cover of its charter*, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstading the manner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage" (120 Fed. 724 at 728).

The same thought was expressed in the same case by the Supreme Court as follows:

> "Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies" (193 U. S. 327).

The cause and effect dealt with in the *Northern Securities* case are similar to the cause and effect shown in the present case. They are the acquisition of stock control of one corporation by another and a resulting restraint. Such cause and effect do not turn upon variant economic views. They do not depend upon the changing opinions of men. They are not true at one time and false at another. They have been the subject of study, debate, consideration and decision by the great lawyers and the great judges of the Nation in the cases above listed, and it has been found that the most effective remedy is complete and absolute divestiture.

We point out particularly that *minimum application* of the rule of the *Northern Securities* case would require a ratable distribution by Columbia Oil to its stockholders of the Panhandle Eastern stock.

### The Standard Oil Co. Case.

The Plan is inconsistent with *United States v. Standard Oil Co.,* 173 Fed. 177; 221 U. S. 1. In that case the defendants had during a period of twenty to thirty

years acquired the stocks of about 70 subsidiary corporations, referred to by the Supreme Court as constituting "a vast amount of property". The combination was capitalized at $100,000,000.

After finding the combination to be violative of the anti-trust laws, the Court laid down the rule with regard to the remedy as follows:

> "* * * to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: 1. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2. The exertion of such measure of relief as will *effectually dissolve the combination* found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about" (pp. 77-78). (Italics ours.)

A decree was thereupon entered which prohibited the defendants from voting the stock of the subsidiary companies, from paying or receiving dividends, and exercising any direction or influence over the companies. As in the *Northern Securities* case, these prohibitions, by destroying the essential attributes of the stock, rendered it useless to the defendants, and forced a divestiture. Ratable distribution was permitted, the decree providing as follows:

> "But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendants corporations that are parties to the combination."

It is contended that the Plan in this case is like the ratable distribution in the *Standard Oil* case. But there is a vast and vital difference. In that case the stock of the acquired companies was diffused amongst a large body of stockholders. In this case the Plan does not even touch the illegally acquired stock.

That the community of interest which exists with regard to Columbia Gas and Columbia Oil will prevent the "effectual dissolution" referred to in the *Standard Oil* case, so long as the Panhandle stock remains consolidated in any affiliated company, is shown by the following. It was thought at the time the Standard Oil decree was entered that a community of interest in the stockholders would be consistent with a removal of the restrictive conditions. The theory was, as stated by the Federal Trade Commission, that the community of interest of stockholders would itself disintegrate, in this wise:

> "* * * the change of the ownership of Standard interests from stockholdings in a single company to holdings of stock in many companies with differing possibilities and earning powers was sure in the course of years to disperse this control as individuals found it desirable to dispose of part of their holdings or as death necessitated distribution of them, or to dilute it as expansion of the industry required the use of new capital. (Report of Federal Trade Commission, entitled Prices, Profits and Competition in the Petroleum Industry, December 1927, Senate Document No. 61, 70th Congress, 1st session; pp. 67-70.)

But this result did not come to pass. Fifteen years after the entry of the Standard Oil decree the Federal Trade Commission made an investigation relative to the efficacy of that decree. It found that in 1915, four years after

the entry of the decree: "The stockholders of all of those companies are to a large extent the same individuals or interests." Nor did the expected disintegration occur in any substantial degree during the following 11 years. (See the tabulation on page 70 of the report.) The failure of distintegration was coincident with the failure to restore competitive conditions. As of 1926 the Trade Commission said that "Each Standard marketing company, following the practice of the organization before the dissolution, still confined its operations to a specific field bounded by the State lines", with "the effect of obtaining the highest price possible for the output of the group as a whole".

If a community of interest thus largely nullified the decree in the *Standard Oil* case, for stronger reason will the present Plan be totally ineffectual to establish a condition in harmony with the law.

Minimum application of the rule of the *Standard Oil* case would not permit Columbia Oil to retain its Panhandle Eastern stock, but would require its ratable distribution among Columbia Oil stockholders.

### The American Tobacco Case.

The Plan ~~is~~ inconsistent with *United States v. American Tobacco Company*, 221 U. S. 106. In that case the defendants had during a period of twenty years consolidated 65 or more companies, individual businesses and corporations under the American Tobacco Company. The combination was capitalized at about $180,000,000.

The Supreme Court did not consider that the complex commingling of the business and affairs of these many

companies during many years, the large capitalization and the money values involved, and the widely ramified relations in the trade, as any reason for an indirect, temporizing and ineffectual remedy. That Court stated the rule with regard to the remedy to be applied as follows:

> " * * * three dominant influences must guide our action: (1) the duty of giving *complete and efficacious* effect to the prohibitions of the statute; (2) the accomplishing of this result with as little injury as possible to the interest of the general public; and (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning" (221 U. S. 185). (Italics ours.)

The Court then proceeded to enter a decree requiring divestiture of stock and assets of the many companies involved.

The minimum application of the rule in the *American Tobacco* case also would require a pro rata distribution by Columbia Oil of its Panhandle Eastern stock.

## The Du Pont Case.

The Plan is inconsistent with *United States v. E. I. Du Pont de Nemours & Co., et al.,* 188 Fed. 127. In that case the defendants attempted to restrain and monopolize the powder trade

> "by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association" (p. 152).

This Court, mindful of the rule stated by the Supreme Court in the *Standard Oil* and *Tobacco* cases that it should apply such relief as should "effectually dissolve" the combination, entered a decree requiring the dissolution of severa corporations and the distribution of their assets, and the organization of two corporations and the transfer of many properties to each, together with many injunctive provisions. The decree also required that during a period of five years none of the corporations should have common officers or directors, and should acquire no stock in another of said corporations.

Defendants cite this case and *United States v. American Tobacco Co.*, 191 Fed. 371, as authority for the five-year veto privilege on directors to be enjoyed by the Department of Justice. But the cases are fundamentally different. The decrees in the *Du Pont* and *Tobacco* cases effected a dissolution of the basic combination. With that substantive relief granted, the danger from common directors after the lapse of five years was greatly reduced. But under this Plan there is no dissolution of the basic, principal combination. There is no severance of the direct and indirect bonds which tie Panhandle to the Columbia interests analogous to the separation of the companies in the *Tobacco* and *Du Pont* cases. If there were, there would be no occasion for the five-year veto

privilege. The veto privilege can be no substitute for the complete and efficacious substantive relief prescribed by this Court in the *Du Pont* case. Minimum application of the rule in the *Du Pont* case would require a complete severance of Panhandle from the Columbia interests.

THE UNION PACIFIC CAES.

The plan is inconsistent with *United States v. Union Pacific R. R. Co.,* 226 U. S. 470. The Union Pacific Company acquired 46 per cent. of the stock of the Southern Pacific Company, thus uniting in a single control two great competitive railroads. The stock was held for the Union Pacific Company by an intervening company (The Oregon Short Line Railroad Company) which it also controlled, by the same method by which Columbia Gas caused Columbia Oil to hold the Panhandle stock. The par value of the acquired Southern Pacific stock was $126,650,000. That company operated a line of railroad extending from New Orleans to Los Angeles, San Francisco and Portland, with branch lines and connections extending into tributary territory.

The Court held that the dominion and control given to the Union Pacific by its acquisition of stock brought the transaction within the condemnation of the antitrust laws. A decree was accordingly entered which prohibited the defendants, including the intermediate company (Oregon Short Line Railroad), whose position was analogous to that of Columbia Oil in this case, from voting the stock, from paying or receiving dividends, and exercising any control whatsoever over the corporate acts of the Southern Pacific Company.

The defendants proposed to comply with the decree by transferring the Southern Pacific shares to the sharehold-

ers of the Union Pacific Company in proportion to their holdings, thus establishing a common ultimate interest of stockholders similar to that existing between the stockholders of Columbia Gas and Columbia Oil Companies. It was contended that such distribution was authorized by the decrees in the *Northern Securities* and *Standard Oil* cases. The transfer was opposed by the then Attorney General, George W. Wickersham, for the following reasons, stated in a memorandum filed with the Court:

> "The Union Pacific interests in effect ask the aid of the court to protect them from loss resulting from the enforced disposition of the Southern Pacific stock unlawfully acquired and held by them. The court will, of course, so mold its decree as not to effect unnecessary injury; but the primary consideration is the public interest, not that of the Union Pacific stockholders. It is to the interest of the public that the Southern Pacific stock now held by the Union Pacific be so widely distributed that the combination is not only terminated but the probability of continued control by the holding of large amounts of stock of the two companies in the same hands be reduced to a minimum.
>
> While the court should avoid, except as a dernier resort, the forced sale of the stock at auction (on the grounds stated in 197 U. S. at page 229) the District Court should be left free to require such disposition of the stock as will best accomplish the ends of the decree without being hampered by the theory of vested rights of the Union Pacific stockholders in the stock to be disposed of, * * *.
>
> The effect of a mere pro rata distribution of the stock among the Union Pacific stockholders is wholly problematical. The stock list affords but little clew to the real ownership. It is well known, however, which an inspection of the stock list confirms, that large amounts of stock stand on the books in the names of banking and brokerage houses. It is true the stock is distributed among

some 22,000 holders, but Mrs. E. H. Harriman, Kuhn, Loeb & Co., and the directors of the Union Pacific R. R. Co. (including the Chicago, North Western Rwy. Co., represented on the board of directors by Mr. Marvin Hughitt) together hold $41,251,000 of its stock; 164 bankers and brokers, each holding 1,000 shares or over, hold $132,787,-800. Indeed 363 holders together hold stock amounting to $196,259,800 or 62.05 per cent of the whole.

It is only the remaining $119,916,500 of stock that is distributed among nearly 22,000 holders.

The Southern Pacific stock, aside from that now held by the Oregon Short Line R. R. Co., in the hands of the public amounts to $146,040,630. This amount is distributed among upwards of 15,000 stockholders."

In declining to approve a distribution among the Union Pacific shareholders, the Court said:

"The plan proposed in the present motion of distributing the stock among the shareholders of the Union Pacific Company or of selling it to such shareholders will in effect transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors * * * " (p. 475).

"It is contended for the appellees, however, that in view of the great number of widely scattered stockholders of the Union Pacific Company, there

is no probability of their acting together to continue the control of the Union Pacific Company over the Southern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind *the object of the statute to end such combinations* and the *duty of the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose,* it is not consistent with that end to order such distribution of the stock as *may* fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law" (pp. 475-476).

"The main purpose of the Act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of proceedings of this character is to decree, *by as effectual means as a Court may, the end of such unlawful combinations and conspiracies.* So far as is consistent with this purpose, a Court of Equity dealing with such combinations should conserve the property interests involved, *but never in such wise as to sacrifice the object and purpose of the statute.* The decree of the Courts must be faithfully executed and *no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate*" (pp. 476-477). (Italics added.)

The present Plan is a flagrant challenge to the rule of law as applied in the *Union Pacific* and in other cases cited herein. Defendants assert that the Plan meets the requirements of the *Union Pacific* case, because in that case the control by the Union Pacific of the Southern Pacific emanated from the power of the stockholders to choose the directors of the Southern Pacific, and that the Plan in this case eliminates the power of the Columbia interests to choose the directors of the Panhandle Company. Two fundamental differences exist. First, in the *Union Pacific* case a divestiture by the intermediate company (The Oregon Short Line Railroad Co.) was required, while in this case the intermediate company, Columbia Oil, is permitted to continue in possession of the stock. Second, in the *Union Pacific* case, while divestiture was required, not even pro rata distribution was permitted because it would result in too great a community of interest among stockholders of Union Pacific and Southern Pacific, while in this case the Plan does not require distribution and permits the community of interest to continue.

The minimum application of the rule in the *Union Pacific* case does not even permit a pro rata distribution by the Columbia Oil & Gasoline Corporation to its stockholders of the Panhandle Eastern Stock but would require an outright sale.

### The Lake Shore Case.

The Plan is inconsistent with *United States v. Lake Shore & Michigan Southern Ry. Co.*, 203 Fed. 295. In that case a group of bituminous coal carrying railroads had procured the control of coal companies and com-

petitive railroads by acquisition of stocks and other securities. The transactions were held to be in violation of the anti-trust laws. The decree required an absolute sale of the stocks. Voting the stock, direction of management and payment of dividends were also prohibited. Pro rata distribution to the stockholders of the principal companies was not permitted. Instead it was provided that the stock should be sold "free from every interest * * * of the railway companies * * * and of the stockholders of each of them."

In the Lake Shore decree, for the first time, appears a provision for the appointment of a person to act for the Court to make a sale of stock. It was provided that if a sale by the parties was not made within two months the Court would appoint a master to make such sale or a receiver to take possession of the stock with the power to sell and dispose of the same.

### The International Harvester Case.

The Plan is inconsistent with *United States v. International Harvester Co.*, 214 Fed. 987. In that case the Harvester Company acquired the stock and assets of many corporations manufacturing harvesting machinery. The combination represented a total capitalization of $120,000,000, and made 85 per cent of all the harvesting machinery sold in the United States.

The Court held the combination violative of the anti-trust laws and ordered its dissolution, saying:

> "It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire un-

lawful business into at least three substantially equal, *separate, distinct, and independent corporations, with wholly separate owners and stockholders,* or in the event this case is appealed and this decree superseded, then within 90 days from the filing of the procedando or mandate from the Supreme Court the defendants shall file such plan, and in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, * * *" (p. 1001). (Italics added.)

### The Reading Case.

The Plan is inconsistent with *United States v. Reading Co.,* 226 Fed. 229; 253 U. S. 26. In that case the defendants were held to have restrained and monopolized trade in anthracite coal by the union of two producing companies through a holding company. As in the preceding cases, the Court ordered a divestiture of stock, with prohibitions as to voting, payment and receipt of dividends and influencing management. The Court refused to permit a pro rata distribution of stock which would result in a community of stockholders. In denying the request the Court said:

> "The principal matter in dispute is whether the individual stockholders of the Central Railroad Company (distinguishing them from the Reading Company and the other corporation defendants) should be permitted to acquire the stock, bonds, and other securities of the Coal Company, and on this point, also, we agree with the Government. In our opinion the doctrine of the *Union Pacific* case, 226 U. S. 470, calls upon us to deny the individual stockholders that privilege" (p. 285).

This ruling was affirmed by the Supreme Court in 253 U. S. 26, with directions for the entry of a decree dissolving the combinati .. by

> "the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other * * *, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh and Wilkes-Barre Coal Company, as may be necessary to establish entire independence between these two companies to the end that the affairs of all of these now combined companies may be conducted in harmony with law" (p. 64).

THE LEHIGH VALLEY RAILROAD CASE.

The Plan is inconsistent with *United States v. Lehigh Valley Railroad Co.*, 225 Fed. 399; 254 U. S. 255. That case dealt with a combination of anthracite coal carrying and producing companies, created, amongst other means, by acquisition of stock control of coal producing companies. The Supreme Court ordered that the District Court should enter a decree—

> "dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., The Delaware, Susquehanna & Schuylkill Railroad Company and the Lehigh Valley Coal Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all property of any character, of any one of said companies owned or in any manner controlled by any other of them as may be necessary to establish their entire independence

of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company must be decreed to be void and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business by buying and selling coal where and from and to whom it chooses with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company" (pp. 270-71):

The minimum application of the rule in the *Lake Shore* case, the *International Harvester* case, the *Reading* case and the *Lehigh Valley* case would require divestiture by Columbia Oil of its Panhandle Eastern stock, but would not permit pro rata distribution among Columbia Oil stockholders.

## Southern Pacific Case.

The Plan is inconsistent with *United States v. Southern Pacific Co.*, 239 Fed. 998; 259 U. S. 214. In that case the Southern Pacific Company acquired all the stock of the Central Pacific, a competitive road. The importance and magnitude of the interests involved, both public and private, and the difficulty of separation, are indicated by the following description:

> "The Central Pacific with its eastern connection at Ogden forms one great system of transportation between the east and the west, and the Southern Pacific with its roads and connections, and steamboat lines, forms another great transcontinental system for transportation from coast to coast. The Central Pacific constitutes some 800

> miles of the transcontinental line of which it is a part. The Southern Pacific system has practically its own line of railroads and steamboat connections to New York via Galveston and New Orleans" (p. 229).

The provisions of the decree directed by the Court were to be as follows:

> "We direct that a decree be entered severing the control by the Southern Pacific of the Central Pacific by stock ownership or by lease. But, in accomplishing this purpose, so far as is compatible therewith, the mortgage lien asserted in the brief filed for the Central Union Trust Company shall be protected" (p. 241).

Proceedings before the Interstate Commerce Commission concluded this *Southern Pacific* case.

### Consent Decree Cases.

The Plan is inconsistent with the consent decrees entered in other corporate combination cases. In the *New Haven* case, the *New England Fish Exchange* case, the *Swift* case, the *Cement Securities* case, the *Ward Food Products* case, the *National Food Products* case, the *Rand Kardex* case, the *Fox Theatres* case, the *Foster & Kleiser* case, and the *Radio Corporation* case, the decrees required a divestiture by outright sale of stock and assets. No ratable distribution of stock or assets to ultimate stockholders was permitted, except in the *Radio Corporation* case, and only partially in that case. The *Radio* decree is the only instance for twenty-eight years in which ratable distribution has been permitted, the last previous instance being the *Du Pont* case in 1912.

In the *Radio Corporation* decree, entered by this Court in May, 1930, the General Electric and Westinghouse companies were permitted to distribute one-half of their holdings among their own stockholders, probably because a large loss might ensue if all the holdings had to be sold at once, but required the defendants to dispose of the remaining half.

In none of these Consent Decree cases did the Court permit the continued holding of the illegally acquired securities.

## The Clayton Act.

The Plan is inconsistent with the provisions of the Clayton Act. The decree entered in this case on January 29, 1936, adjudges that the petition states a cause of action under the Clayton Act. It states:

> "* * * that the petition states a cause of action under the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and *the Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."* (Italics added.)

That Act gives the Trade Commission concurrent jurisdiction with the courts for the enforcement of compliance with Section 7, which prohibits such acquisitions of stock as that between Columbia Oil and the Panhandle Company; and specifically provides that the remedy shall be divestiture, namely, that the Commission shall enter an order requiring the defendant to "divest" itself of the stock. The provision stated in full is as follows:

> If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person *an order requiring such person* to cease and desist from such violations, and *divest itself of the stock held* or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order (Section 11).

Section 8 of the Clayton Act, referred to in the above excerpt, prohibits interlocking directors.

The Clayton Act thus consititutes a declaration by the Congress that divestiture by the defendant, that is, ridding himself of the stock, is not only the most efficacious remedy but the only permissible one under the law. The remedy prescribed by the statute is one as to which the Trade Commission has no discretion. The failure of Congress to also specifically prescribe that remedy in cases brought in the courts was no doubt because that remedy had already become established as the appropriate and effective remedy in cases theretofore decided by the courts and heretofore shown in this brief.

In *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, the Western Meat Company acquired the stock of the Nevada Packing Company, and the Trade Commission entered an order under Section 7 of the Clayton Act requiring the Western Meat Company to "divest itself absolutely of all capital stock of the Nevada Packing Company." The defendants sought to circumvent the statute by using the stock to acquire the assets of the Nevada

Packing Company and thus oust the jurisdiction of the Commission. The Supreme Court upheld the Commission's order, saying:

> The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property (p. 559).

## POINT II.

**The identity of stockholders of Columbia Oil and Columbia Gas constitutes a community of interest which renders the proposed plan ineffective.**

Much has been made of the fact that both Columbia Oil and Columbia Gas are corporations whose stock is widely distributed among the public; that they are in effect publicly-owned corporations. This is a myth that deserves to be exploded. As we have pointed out, 1% of the stockholders own 57½ per cent. of the common stock of Columbia Gas, while 1.3 per cent of Columbia Oil stockholders own 33.2 per cent of that company.

The Special Master has found (Finding VII), that the Columbia Oil stock was originally distributed by Columbia Gas in 1930 as a dividend to its common stockholders; at present Columbia Gas stockholders own 68 per cent. of the stock of Columbia Oil.

The Master further finds that no evidence has been presented as to how much more Columbia Oil stock is owned by preferred stockholders or by bondholders of Columbia Gas other than common stock; nor as to how much Columbia Oil stock could be controlled or influenced by such persons (Findings VIII).

The most reliable evidence as to the identity or lack of identity of Columbia Gas and Columbia Oil stockholders is peculiarly within the possession of the defendants. A showing of wide distribution would have been in their favor. The fact that they have made no disclosure of that evidence, strongly argues that the identity is as complete if not more complete than as stated. This is borne out by the Special Master when he says:

> "* * * no attempt was made to show the holdings of persons, such as close relatives, not living in the same house, friends or business associates, not included in this narrow classification but who might be expected to follow the wishes, advice or example of the persons whose stock holdings were disclosed. I do not imply that it would have been possible to submit data showing such holdings *but, the burden being on the proponents of the plan, I am willing to assume that such persons, who might vote their stock in favor of Columbia Gas rather than Columbia Oil where there was a convict of interest, do not hold a substantial amount.*" (Italics added.)
>
> "There is not included in the tabulation above the stock held in the 'Street' names of Coggeshall and Hicks, Gude, Winmill & Co., Jessup and Lamont, or W. E. Hutton & Co., except the stock actually owned by J. F. Hutton, though the holdings of these brokers appeared in Columbia Oil Exhibit 2 and Missouri-Kansas argues that on account of the close connection between these firms and Colum-

bia Gas, it would be reasonable to assume that much of the stock in these names might be voted in the interests of Columbia Gas, which may be true. If such an assumption were accepted, 113,517 shares would be added to the holdings listed above making a total of 329,392 shares, excluding Mr. Gessler's."

As we have pointed out, a striking parallel as to identity of stockholders exists between this case and the *Union Pacific* case. In the *Union Pacific* case the problem was to dispose of 46% of the stock of the Southern Pacific Company which the court had decided could not be held for the benefit of the Union Pacific Railroad because of the condition of potential and natural competition between Union Pacific and Southern Pacific. The court specifically refused to permit the 46 per cent. holding in Southern Pacific to be distributed as a dividend to Union Pacific shareholders, saying:

> "In considering these questions we must bear in mind not only the number of stockholders but the character of the distribution of the stock among them. In the brief and exhibits the appellees filed with this Motion it is shown that of the 22,150 stockholders of the Union Pacific Company, 68, owning five thousand or more shares each, hold together $139,782,700 of the stock, and 300 others, owning from one to five thousand shares each, hold together $59,020,700 of the stock, and that the two groups, comprising 368 stockholders, hold $198,-803,400, or 62.8 per cent of the stock."

So finding, the court refused to permit the Southern Pacific stock to be distributed among Union Pacific stockholders because the identity of ownership resulting from such distribution would be so great that it would not be a compliance with the anti-trust laws.

It must be noted that the proposal which the court refused was to permit the 368 largest stockholders of Union Pacific to hold 28.9 per cent of the stock of the Southern Pacific. (This 28.9 per cent is reached by multiplying 46 per cent by 68 per cent.) These figures are startlingly close to the figures shown by the defendants' exhibits introduced as evidence before the Master in this case (Columbia Gas & Electric Corporation Exhibit 9). That shows that 370 Columbia Gas stockholders own 33.2 per cent of the stock of Columbia Oil. Two of these stockholders, Gossler and the United Corporation, propose to partially sterilize the voting power of their stock; we use the word "partially" because if the voting power of that stock was ever needed, there is nothing to prevent Gossler and United Corporation from transferring it to friendly hands. These two stockholders own 7.2 per cent of the stock of Columbia Oil. If these two holdings be deducted, we have 368 stockholders, precisely the same number discussed in the *Union Pacific* case, but in the present case these 368 own 26 per cent. of all of the stock of Columbia Oil, or 28 per cent. of all the stock that can vote after 7.2 per cent. has been sterilized.

In order to approve this Plan it would, therefore, be necessary to overrule not only the principle, but even the actual mathematics of the *Union Pacific* case. It will, of course, do much greater violence to the principle of the *Union Pacific* case to permit the continued existence of the illegally acquired stock of Panhandle Eastern as a single block in the hands of a corporation subject to the control of Columbia Gas stockholders owning almost exactly the same percentage expressly held to be offensive in the *Union Pacific* case.

The vice of the present Plan goes even further:

The record shows, and the Master finds, that the average attendance of stockholders at annual meetings of Columbia Oil & Gasoline range from 46 to 50 per cent. of the total shares outstanding; and the vote that would be cast by the 368 stockholders above-mentioned could carry with it really a vote of 52 per cent (or of almost 66 per cent. if the Gossler and United Corp. stock be added) of the vote which experience has shown is cast at the average meeting of Columbia Oil.

It must be further noted that the 370 stockholders above-mentioned are included among the 580 largest stockholders of Columbia Gas (1% of the total number of stockholders of that company) who own a total of 57½ per cent. of Columbia Gas Company.

## POINT III.

**The Plan attempts the use of a corporate fiction to circumvent the law.**

The cases above discussed show that the Supreme Court has never deviated from the principle that it is the duty of the Court to follow that method of dissolution which is the most efficacious practicable method. Throughout the 50 years of anti-trust law enforcement there has been no departure from this rule. Without exception the method of dissolution always required by the Supreme Court has been the simple one of transfer of the stock illegally acquired away from the corporation by which it was acquired.

In several cases courts have hesitated to order an immediate outright sale of stock illegally acquired and held,

and have permitted a ratable distribution to shareholders. This has been done only when it affirmatively appears that a complex situation exists and that unnecessary hardship would result from outright sale. No such showing has been made before the Special Master in this case, and not even an assertion of hardship incident to the outright sale of the Panhandle Eastern stock has been made on the record, or could be supported.

The proposed Plan fails to meet the requirements of the law because (1) The present Plan obviously does not disturb the ownership by Columbia Oil of the illegally acquired Panhandle Eastern stock, and (2) the Report of the Special Master discloses that the outright sale of Columbia Oil stock in Panhandle Eastern would be a completely and certainly effective method of dissolution of the illegal combination, as opposed to the uncertainties of the present Plan. For no other reason than the arbitrary choice of the defendants it is proposed to discard the certainly effective method in favor of an untried, uncertain and inefficacious one.

While the defendants characterize the Plan as one providing for divestiture and therefore argue that it meets the requirements of the law, the truth is that it has not one single attribute of divestiture within the meaning of the law. Of what are the defendants to be divested under the Plan?

*As to Columbia Gas*: It divests itself of 400,000 shares of preferred stock of Columbia Oil, by transferring it to Columbia Oil.

*As to Columbia Oil*: It divests itself of the stocks and obligations of five subsidiary companies, by transferring them to Columbia Gas.

*As to the individual defendants*: None except the defendant Gossler divests himself of anything he now owns or holds. Gossler is required to sell all stock owned by him in Columbia Oil; but he has five years within which to do so.

These transactions are not divestitures within the meaning of the law or by analogy with any of the previous cases. They are mere intercombination transfers. When it is realized that they are mere transfers of title from one agent of the combination to another, it is plain that these defendants seek to apply a new and special meaning to the word "divestiture" not warranted by any existing precedent. A decree which approves such transactions will not really interfere with the combination. It will constitute, as said by Thurman W. Arnold in his book *Folklore of Capitalism*, a useless "ritual," deflecting the attack upon this combination into "purely ceremonial channels." An empty ceremony because the corporate fiction is used to circumvent the law.

Chief Justice White held in the *American Tobacco Co.* case, 221 U. S. 106, that there was no possibility of circumventing the policy of the anti-trust laws by such a "disguise or subterfuge of form." In *United States v. Northern Securities Co.*, 120 Fed. 721, the defendants attempted to save the combination by reliance upon the corporate fiction. Relative to the argument that they "might create a purely fictitious person termed a corporation" to consolidate the two railroad companies, and thus safely circumvent the law, the court said:

> "The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect the law, as

administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished" (p. 726).

If the proposed Plan shall be permitted Columbia Gas, Columbia Oil and Panhandle will be consolidated and controlled by three kinds of proprietary relationship, namely, (1) by the same body of ultimate stockholders, (2) by ownership in Columbia Gas of a minimum of $11,000,000 to a maximum of $23,000,000 of Columbia Oil debentures, and (3) by ownership in Columbia Oil of stock control of Panhandle. In the cases heretofore discussed in this brief such methods of consolidation and control have been without exception condemned and dissolved.

Turning to the Plan, we find the following provisions relative to choosing directors:

> "All officers and directors of Columbia Oil shall resign upon the entry of the order and the approval of the Plan by the Securities and Exchange Commission (to the extent required by law), and be replaced by officers and directors *not objectionable to the Department of Justice*, such directors to own no stock or securities of Columbia Gas. Such directors shall not include anyone who is now, or ever has been, an officer, director or employee of Columbia Gas or any of its subsidiary companies.
>
> * * * * *
>
> The representatives of Columbia Oil on the Board of Directors of Panhandle Eastern shall be directors of Columbia Oil."

Under this provision directors of Columbia Oil and of Panhandle will be chosen in the first instance by the stock-

holders of Columbia Oil. The power to select directors is reduced, if it is reduced at all, in only one respect, namely, that the Department of Justice, by objecting to one or more selections, may prevent their assumption of office. The veto privilege as to directors of Columbia Oil to be granted to the Department of Justice, that is, that the directors shall be "not objectionable to the Department of Justice," obviously is not an adequate substitute for a comprehensive, basic, traditional and certain remedy.

The *Union Pacific* case did not leave the power to choose directors thus undisturbed in the Union Pacific Company, and transfer a veto privilege to the Department of Justice, or to any other agency, no matter how sacrosanct. Instead, in that case the Court wiped out the power to elect directors *in toto* and in perpetuity; and that is the only valid, safe and practicable course. For if the Plan in this respect is valid, we would need a Department for the Appointment of Corporation Directors enjoying the privilege of appointing literally hundreds of persons to lucrative sinecures at the expense of the corporations. We would need a Department for the Administration of Unlawful Monopolies and Restraints of Trade, in which the courts might permanently intern the property and business and affairs of the citizens.

Such consequences serve to show that not only is this Plan a dangerous departure from our established laws, but is offensive to our basic institutions, and that it is repugnant to the fundamental attributes of equitable jurisdiction, in that it transfers the power of the Court to control those engaged in administering its decrees to an agency over which, as a coordinate and independent branch of the Government, the Court can exercise no authority whatever.

It is no answer to say that such incongruity and danger is illusory, because this will be the only instance. Can this Court, any more than another court, prevent the use of its adjudications as authoritative precedents in subsequent cases. This Court can not in this case begin and end the instances of such a privilege in the Department of Justice. It is no answer to say that this case will be the only instance because what is decreed depends upon the volition of the defendants, and the privilege may only be given where the defendants consent. This is merely to say, what is indeed true, that the proposed decree is the voluntary, uncompellable act of the defendants and not the independent judicial act of this Court.

This privilege would be a highly useful one to any public officer; and it would be hard to imagine a consideration which would operate more powerfully to win acquiescence in a palliative remedy of which the privilege is a part. It has the semblance of an exchange of patronage for immunity; and there is a dangerous probability that some day, if not now, it will be used for such a purpose. That is enough to discredit it and cause its rejection by the Court.

## POINT IV.

### Plan Should Be Disapproved.

The Plan as proposed should be disapproved because:

(1) It permits the retention of the illegally acquired stock in a single block by the same corporation which illegally acquired it contrary to every precedent;

(2) Although it is conceded that there must be complete separation either between Panhandle Eastern and

Columbia Oil or between Columbia Oil and Columbia Gas, the Plan leaves the relationship between Panhandle Eastern and Columbia Oil undisturbed and fails to separate Columbia Oil from Columbia Gas by leaving a community of interest among stockholders of those Companies of precisely the same proportion as was specifically condemned by the Supreme Court in the *Union Pacific* case plus such added community of interest as may exist because of ownership of Columbia Gas preferred stock and bonds by Columbia Oil stockholders, the extent of which is undisclosed, and plus such community of interest as will exist because of ownership by Columbia Gas of Columbia Oil bonds amounting to from $11,000,000 to $23,000,000;

(3) The device proposed by the Plan to neutralize Columbia Gas control over Columbia Oil by giving the Department of Justice veto power over election of Columbia Oil Directors, is unprecedented, uncertain as to corporate legality, uncertain as to permanently binding effect of stockholders' consent, uncertain as to meaning and operation and grossly improper in setting up bureaucratic power over private corporate affairs.

Respectfully submitted,

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